EMTEX CORP. BHD.

v.

MBF HOLDINGS BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[SUIT NO. C 3004 OF 1985]
26 JUNE 1985

COMPANY LAW: *Takeover - Defendant issued takeover notice pursuant to s. 179, Companies Act to plaintiff - Capital Issues Committee approval not yet obtained when s. 179 notice issued - Plaintiff sought injunction against takeover offer - Whether plaintiff had locus standi.*

The defendant made a takeover bid for Emtex Corporation Berhad (the plaintiff) and served the plaintiff with a takeover notice pursuant of s. 179 of the Companies Act 1965. The defendant had earlier submitted this proposal to the Capital Issues Committee but at the time the s. 179 notice was issued the CIC's approval had not been given. The plaintiff challenged the validity of the s. 179 notice. The defendant's, contention was that the plaintiff had no *locus standi* to challenge the notice since the takeover bid offers were made to the shareholders of Emtex and not to Emtex itself.

Held:

[1] By s. 179 of the Companies Act, Emtex the offeree corporation is required to issue a statement in terms of Part C of the 10 Schedule to the Act which could include the recommendations of the directors on the takeover scheme. This itself demonstrated that Emtex was dubious about the procedures adopted to effect the takeover and therefore had a genuine interest in having its legal position declared. Furthermore, the Judge was of the view that the takeover of a corporation does affect a corporation to such an extent as to give it the required *locus standi* to seek the opinion of the Court on the validity of the purported takeover exercise.

[2] On a time construction of s. 6 of the Securities Industry Act, an offeror is not to embark on a takeover exercise of a company without the prior approval of the CIC. This CIC approval had to be obtained even prior to sending off the s. 179 notice to the offeree company. To proceed with the takeover exercise without such approval having been obtained will be a breach of the requirement of s. 6 and as such can and will be restrained by Injunction.

[Injunction granted.]

Cases referred to:
Colortone Holdings Ltd. v. Calsil Ltd. [1965] Victoria Reports 129
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177
Aberfoyle Plantations Ltd. v. Khaw Bian Cheng [1960] 26 MLJ 47
National Assistance Board v. Wilkinson [1952] 2 QB 648
George Wimpey & Co. Ltd. v. BOAC [1954] 3 All ER 661

Legislation referred to:
Companies Act 1965, s. 179
Securities Industry Act 1983, s. 6

Other source referred to:
Supreme Court Practice (1979) Vol. 1, para. 29/1/110

For the plaintiff/applicant - Robert Amirtharaj Lazar (Michael Lim with him); M/s. Shearn Delamore & Co. and Drew & Napier

For the defendant - YM Raja Aziz Addruse (Mohamed Ismail, Porres P. Royan and Wilfred Durai with him); M/s. Zain & Co.

[**Editor's Note:** Appeal against this judgment was dismissed by the Supreme Court, *vide* Supreme Court Civil Appeal No. 213 of 1985.]

JUDGMENT

VC George J:

Section 6 of the Securities Industry Act 1983 makes it incumbent on all public limited companies incorporated in Malaysia (unless specifically exempted from doing so) to submit proposals for any takeover scheme (within the meaning of s. 179 of the Companies Act 1965) to and for the approval of the Capital Issues Committee (CIC). On 17 May 1985 MBf Holdings Bhd. (MBf) submitted such a proposal to the CIC for the takeover of another public company, Emtex Corporation Bhd. (Emtex).

Section 179 of the Companies Act regulates takeover schemes. That section provides *inter alia* that a takeover offer shall not be made unless the offeror corporation has, not earlier than 28 days and not later than 14 days, before the offer is made to the shareholders of the offeree corporation given or caused to be given notice in writing of the takeover scheme (in terms prescribed by the section) to the offeree corporation.

On 29 May 1985 Emtex received what was purported to be a s. 179 notice issued at the instance of MBf. Later, on 1 June 1985 an amended version of the notice was also received by Emtex which amended version was regarded by both parties as the relevant s. 179 notice. The notice disclosed that a general offer was to be made to acquire all the shares in Emtex on the basis of six "new" fully paid up shares of 50 cents each of MBf for every five fully paid up Emtex shares of RM1 each. The notice also disclosed that the offer to be made to each of the shareholders of Emtex would be a conditional offer viz:

CONDITIONS OF THE OFFER

2 (a) The offer is conditional upon the following:

(i) the passing of the necessary resolution(s) by the shareholders of MBf to approve the Offer;

(ii) consents to the Offer being obtained from the Foreign Investment Committee and the Capital Issues Committee in Malaysia and all other necessary consents or approvals in relation to the Offer being obtained in a form satisfactory to MBf;

(iii) the listing and quotation of the new MBf ordinary shares to be issued pursuant to the Offer being granted in principle by The Kuala Lumpur Stock Exchange ("The KLSE"); and

(iv) no government, governmental, regulatory body enacting any statute or regulation which, would in the opinion of MBf prohibit, materially restrict or materially delay the making of the Offer, or its implementation.

(b) The Offer is not conditional upon the following:

(i) The Offer is not conditional upon acceptances being received in respect of a minimum number of the Offer Shares.

(ii) The Offer is not conditional upon shareholders of Emtex approving or consenting to any payment or other benefit being made or given to any director of Emtex or any corporations which is deemed by virtue of s. 6 to be related to Emtex as compensation for loss of office or as consideration for, or in connection with, his retirement from office.

When the s. 179 notice was received by Emtex, CIC approval of the proposed takeover scheme had not been obtained for or on behalf of MBf.

On 7 June 1985 Emtex caused the instant writ to issue against MBf *inter alia* for a declaration that CIC approval had to be obtained in respect of the proposed takeover scheme before a valid s. 179 notice could be sent and that (in any event) any offer subject to those conditions is "void for the purposes of s. 179 of the Companies Act".

On the same day 7 June 1985 the plaintiff caused an *ex parte* summons in chambers [encl (3)] to issue seeking an injunction restraining the defendant from making the offer (in respect of which the s. 179 notice had been given). When the application came before me on 8 June 1985 I directed that it be heard *inter partes* on 13 June 1985. It was and the hearing went on for a few days and on 22 June 1985 I held that on a true construction of section 6 of the Securities Industry Act an offeror cannot embark on a valid takeover exercise without the prior approval of the CIC. The injunction sought by prayer 1 of the summons was granted.

Encik Mohamed Ismail of Counsel for the defendant had taken a preliminary point - he questioned the *locus standi* of Emtex to bring the action. His contention was that the offers to be made were to the shareholders of Emtex and not to Emtex. He complained that Emtex was interfering with the rights of the shareholders who were not before the Court some of whom it was suggested could be interested in accepting the offer to be made by MBf. *Colortone Holdings Ltd. v. Calsil Ltd.* [1965] Victoria Reports 129 was cited and the passage from line 15 at p. 138 was read.

In *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 the Federal Court discussed the issue of the entitlement of a plaintiff to bring a declaratory action and seek an injunction. The judgment stated at p. 178 of the report:

> On a general consideration of the authorities it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a 'real interest' in the suit.

And at p. 179 is this passage:

> It might not perhaps be inappropriate to make some observations on the *locus standi* rule in relation to injunctions and declarations. We refer to *Lim Cho Hock v. Government of the State of Perak & 2 Ors.* and accept and approve the discussion in the judgment in that case (at p. 149-151) on the question of *locus standi* and endorse the concept of liberalizing the scope of individual standing...
>
> The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice ...

By s. 179 of the Companies Act, Emtex the offeree corporation is required to issue a statement in terms of Part C of the Tenth Schedule to the Act which could include the recommendations of the directors of Emtex on the takeover scheme. In my view this alone demonstrated that if Emtex was reasonably dubious about the procedures adopted to effect the takeover it had

a genuine interest in having the (and its) legal position declared. Apart from that and in any event I was and am of the view that the takeover of a corporation does affect the corporation to such an extent as to give it the required *locus standi* to seek the opinion of the Court on the validity of the purported takeover exercise. I ruled in favour of the plaintiff.

In respect of the contentions made on behalf of the plaintiff, I found no merit in the argument that the offer to be made pursuant to s. 179 of the Companies Act should not result in a conditional contract. Encik Robert Lazar for the plaintiff was particularly concerned about conditions 2(a)(i) and 2(a)(ii) which have been reproduced hereabove.

The general law of contract allows parties to enter into contracts containing one or more conditions precedent, see *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] MLJ 47. Now,

> ... It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion ..." *National Assistance Board v. Wilkinson* [1952] 2 QB 648 at 661.

Also

> ... where the language of a statute is not calculated to deal with a situation to which it has to be applied and the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law; ..." *George Wimpey & Co Ltd. v. BOAC* [1954] 3 All ER 661 at 661 bottom and 662.

I could not see in s. 179 any express or even implied provisions prohibiting the parties concerned from entering into a contract containing conditions precedent.

Raja Aziz Addruse also for the defendant drew attention to the fact that a reading of the Tenth Schedule to the Act in fact suggests that conditions precedent may be imposed by the offeror corporation. See Tenth Schedule Part A para. 2 and 3. Paragraph 2 is of course an example of a clear prohibition of the type that *National Assistance Board v. Wilkinson* was talking about. Whether the conditions imposed are fair is quite another question and in respect of which, certainly at this stage of these proceedings, I see no call for the Court to express any opinion.

What then was left was the other contention for the plaintiff that s. 6 of the Securities Industry Act called for an offeror corporation to obtain CIC approval for a takeover scheme before sending or causing to be sent the s. 179 notice.

Prior to the introduction of s. 179 of the Companies Act in respect of a takeover of a corporation, the offeror could and sometimes did communicate with the corporation to be taken over and thereupon the directors of that corporation could advise the shareholders of what they thought of the offer. It was however a legitimate practice for an offeror to make its offers direct to the shareholders. What s. 179 did was to make it obligatory to follow the former practice of the offeror communicating with the company to be taken over rather than with the shareholders. The section also imposes a duty on the company receiving notice of an offer, to provide certain prescribed information to its shareholders. I share the view of the Australian Judge in *Colortone Holdings Ltd v. Calsil Ltd.* supra on the reasons for the introduction of their s. 184 and I too hold that our s. 179 was enacted similarly to protect shareholders from becoming vulnerable to takeover bidders and having their rights coaxed away from them upon inadequate information and advice. Under the provision of s. 179 some measure of protection is given to all shareholders as a class by imposing duties on the offeror

and offeree companies. Section 179 causes a slowing down of the process of a takeover so that shareholders are not taken by surprise and may obtain advice from an adverse party to the offeror and that advice will come from persons who have an intimate knowledge of the company to be taken over, namely members of its board of directors.

However it would seem that in Malaysia Parliament was not satisfied that the mischief that s. 179 was to remedy was not in fact effectively being so remedied. This led to the enactment in 1983 of s. 6 of the Securities Industry Act in the terms that it was enacted. Clearly it was the intention of Parliament that in spite of themselves the shareholders of a company that was to be taken over had to be protected. The Capital Issues Committee (CIC) which was created to advise the Minister and the Registrar of Companies on matters relating to the securities industry was given the additional task of *inter alia* deciding whether a takeover of a company should be allowed in deciding which, by s. 6(2)(b), the CIC has to consider the viability of the company, the quality and capability of its management and the interest of the public. It seems to me that in as much as that the implementation of the provisions of s. 179 provided the shareholders with *inter alia* the advice of the board of management of the company on the proposed takeover, s. 6 provided the shareholder the further benefit of having the stamp of approval of the CIC on the takeover. For that to be meaningful the shareholder should obtain the benefit of the view of the CIC before he exercises the option to accept or reject the offer. For it to be meaningful the stamp of approval of the CIC has to be given to the proposal rather than the actual takeover. Further it has to be noted that the CIC is required to decide whether the proposed takeover should be allowed in the public interest. Proposed takeovers can cause fluctuations in the market, can result in an upsetting of the fine balance that can exist in equity holdings which become relevant *vis-a-vis* the National Economic Policy and so on. This too leads to the view that on a true construction of s. 6 an offeror is not to embark on a takeover exercise of a company without the prior approval of the CIC. The offeror has to obtain CIC approval even prior to sending off the s. 179 notice to the offeree company. To proceed with the takeover exercise without such approval having been obtained will be a breach of the requirements of s. 6 and as such can and will be restrained by injunction. In a proper case as where the defendant is plainly acting in breach of statute, the Court will on motion or summons grant an interlocutory injunction even though to do so would be to grant the plaintiff substantially all or even the whole remedy or relief claimed in the action (The *Supreme Court Practice* (1979) Vol. 1 para 29/1/110).

The injunction sought by encl. 3 was granted.

Also found at [1985] 2 CLJ 235